

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Victor H. Duran-Gamboa, :
Petitioner : Civil Case No. 2:13-cv-1162
v. : Criminal No. 2:12-cr-74-2
United States of America, : Magistrate Judge Abel
Respondent :
:

Report and Recommendation

Petitioner Victor H. Duran-Gamboa, a prisoner at the Northeast Ohio Correctional Center, brings this action for writ of habeas corpus under 28 U.S.C. §2255. This matter is before the Magistrate Judge for preliminary consideration under Rule 4, Rules Governing Section 2255 Cases in United States District Courts.

The petition alleges that on March 22, 2013, petitioner Duran-Gamboa was convicted in the United States District Court for the Southern District of Ohio by his guilty plea of conspiracy to possess with intent to distribute and to distribute over 100 kilograms of marijuana in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B)(vii). He was sentenced to a term of 60 months in prison.

Petitioner did not appeal the sentence. The petition here alleges the following grounds for relief:

One: Although petitioner was sentenced for possession with intent to distribute 1056.07 kilograms of marijuana, only 909 kilograms were confiscated.

Two: He should have been sentenced under the mandatory minimum 60 month sentence because of the safety valve in section 2D.1.1 of the Sentencing Guidelines.

Three: His role in the offense was limited to being a lookout and was qualified for a lower sentence under 18 U.S.C. § 3553(F).

Four: He was the least culpable offender.

Claims that could have been raised on direct appeal but were not are waived.

Regalado v. United States, 334 F.3d 520, 528 (6th Cir. 2003). Here petitioner did not take an appeal; consequently, his claims regarding sentencing are waived unless he can demonstrate cause and prejudice for failing to file an appeal. *Id.* The petition alleges neither cause nor prejudice.

Accordingly, the Magistrate Judge RECOMMENDS that this action be DISMISSED because the claims pleaded in the petition should have been raised on direct appeal but were not.

If any party objects to this Report and Recommendation, that party may, within fourteen (14) days, file and serve on all parties a motion for reconsideration by the Court, specifically designating this Report and Recommendation, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1)(B); Rule 72(b), Fed. R. Civ. P.

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to *de novo* review by the District Judge and waiver of the right to appeal the judgment of the District Court. *Thomas v. Arn*, 474 U.S. 140, 150-52 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). See also, *Small v. Secretary of Health and Human Services*, 892 F.2d 15, 16 (2d Cir. 1989).

s/Mark R. Abel
United States Magistrate Judge